No. 88-305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF SOUTH CAROLINA,
Petitioner,

vs.

DEMETRIUS GATHERS,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF SOLACE, FRIENDS OF SOLACE, NORMAN FELTON, AND MARY JO GRUCA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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State of South Carolina,

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On Writ of Certiorari to the Supreme Court of South Carolina

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF SOLACE, FRIENDS OF SOLACE, NORMAN FELTON, AND MARY JO GRUCA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

Pursuant to Rule 36.3 of the rules of this Court, amici respectfully request leave to file the attached brief of amici curiae in support of Respondent. Although Respondent has consented to the filing of this brief, due to time

constraints, Amici has been unable to obtain permission to file from Petitioner.

STATEMENT OF INTEREST OF AMICI CURIAE

SOLACE is a membership organization of approximately two hundred individuals, who have had a family member by blood, marriage, or adoption who was murdered, including those killed by drunk drivers. Although the organization is open to relatives of those executed by the state, only a few such persons are currently members. Formed in July 1988, SOLACE is a nationally-based organization headquartered in Atlanta, Georgia. SOLACE was created to serve the needs of families of murder victims, support alternatives to capital punishment, and provide a forum for public education on the needs of murder victims' families and on capital punishment.

FRIENDS OF SOLACE is an organization dedicated to supporting the goals of SOLACE through fundraising and other activities. The organization, which is based in Albany, New York, has approximately three hundred-fifty members and supporters and includes many friends of murder victims.

Norman Felton and Mary Jo Gruca are both relatives of murder victims. Norman Felton's daughter, son-in-law, and nine-month-old granddaughter were murdered in Detroit, Michigan. Three individuals were convicted of the crimes and sentenced to life in prison without the possibility of parole. Throughout the ordeal, Mr. Felton was in contact with the Michigan authorities and in attendance at the trials.

Mary Jo Gruca's brother, Jim Gruca, was killed in the course of a burglary in

October 1983, in Los Angeles County. The murder remains unsolved.

For the foregoing reasons, amici curiae respectfully request leave to file this brief amici curiae in support of Respondent. Amici's participation in this case will provide this Court with important perspectives that we believe will not be otherwise presented.

Dated: January 31, 1989

Respectfully submitted,

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INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner and Amici in support of Petitioner urge this Court to overrule or severely curtail the holding in Booth v. Maryland, 482 U.S. ___, 107 S. Ct. 2529 (1987). In Booth, this Court held that a death sentencing determination should not be influenced by the constitutionally irrelevant factors of the victim's status in the community and personal characteristics and the effect that the victim's loss had on family members. Id. at 2533. We respectfully submit that this Court correctly interpreted the Eighth Amendment in Booth and that this occasion should not be used to overrule that decision.[1]

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[1] The instant case questions only the first prong of the Booth decision--whether the victim's status in the community and personal characteristics may influence a death sentence determination. At trial, the State of

First, permitting the prosecution to introduce evidence of or argue a victim's good character to the jury will result in death penalty proceedings dominated by a debate about the character and social worth of the victim. Rather than providing "the jury a quick glimpse of the life [the defendant] chose to extinguish," Mills v. Maryland, 486 U.S. ___, 108 S. Ct. 1860, 1876 (1988) (Rehnquist, C.J., dissenting), the proceedings will degenerate into a parade of the victim's "evil" deeds and human

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South Carolina did not attempt to present or argue the effect that Mr. Haynes' murder had on his family and friends. Although Petitioner and amici in support of Petitioner requests that Booth be overruled in its entirety, such a sweeping request is untenable as the remainder of the Booth holding is not before the Court. Nevertheless, although this brief addresses only the validity of the first prong of the Booth holding, many of the arguments contained herein equally support the Booth holding with respect to the second prong.

foibles, thus prolonging the suffering of the victim's family and loved ones and distracting the jury's attention from its responsibility to determine whether the death penalty is the appropriate sentence for the defendant.

Second, the "evolving standards of decency" that give meaning to the Eighth Amendment do not permit the State to impose a death sentence because a murder victim's status and personal characteristics are valued by the community. Permitting the State to differentiate the quantity and quality of punishment based on the victim's social worth offends the democratic precepts upon which this society was formed and violates this Court's interpretation of the Eighth Amendment.

ARGUMENT

I.

THIS COURT SHOULD REAFFIRM BOOTH V. MARYLAND TO PREVENT DEATH SENTENCING PROCEEDINGS FROM BECOMING A BATTLE OVER THE SOCIAL WORTH OF MURDER VICTIMS AND PROLONGING THE AGONY OF THE VICTIM'S FAMILY AND FRIENDS

The criminal justice system has long been accused of being unresponsive to and uncaring for the needs of crime victims and their family and friends. See, e.g., Task Force on the Victims of Crimes and Violence, Final Report of the APA Task Force on the Victims of Crime and Violence, 40 Am. Psych. 107 (1985); Gibbons, Victims Again: Survivors Suffer Through Capital Appeals, 74 A.B.A. J. 64 (Sept. 1988). Amici in support of Petitioner assert that overruling Booth would make the criminal justice system more responsive to these needs. See Brief of Amici Curiae of Washington Legal Foundation et al., at 22-30. In

reality, however, victims' families will not be served by permitting the personal characteristics of the victim to influence death sentencing decisions.

A major concern underlying the Booth holding was that introducing a victim's character and social status in the community into a death sentencing proceeding "could well distract the sentencing jury from its constitutionally required task [of] determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime." 107 S. Ct. at 2535. Given the realities of capital representation, such concerns are substantial.

An overruling of Booth v. Maryland would permit the death sentencing proceeding to become a battle over

whether the loss to society caused by the victim's death justifies the execution of the defendant. Without the clear prohibition against such distracting influences, death penalty proceedings likely will become thoroughly infused with such considerations. The result will have a devastating effect on the families and friends of victims.

Confronted with the prospect of a death sentencing determination influenced by the victim's personal characteristics, a defense attorney, whose responsibility includes a thorough investigation of the prosecution's case, would have to analyze every facet of a victim's life. See, e.g., Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. Rev. 299, 335 (1983) ("A true advocate cannot permit a capital case to go to the

sentencer on the prosecution's one-sided portrayal alone and claim to be rendering effective assistance."); see also Strickland v. Washington, 466 U.S. 668 (1984).

Moreover, even though investigations may focus on gathering evidence to rebut the State's case in aggravation, a defense attorney might decide to use the victim's "bad" deeds and socially undesirable characteristics. As this Court in Booth recognized, when the state is permitted to introduce such evidence, "the defendant presumably would be permitted to put on evidence that the victim was of dubious moral character, was unpopular, or was ostracized from his family." 107 S. Ct. at 2535. Under the current law in South Carolina, all evidence of the victim's character -- good and bad -- is excluded

from the penalty trial. See State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985). By overruling Booth v. Maryland, this Court would open the door to wholesale attacks by defense attorneys on the character of victims, either to rebut claims made by prosecutors or, independently, as mitigating factors.

Finally, the criminal proceedings, themselves, will be adversely affected. Defense counsel can be expected to use jury selection to determine personal assessments of character. See Turner v. Murray, 476 U.S. 28 (1986). Prospective jurors can expect to be voir dired on their beliefs on a wide range of character traits. Thus, the focus of the penalty trial will be on the victim's family and friends, as they will be called upon to testify to the victim's characteristics. Moreover, rather than

being left with the memory of the victim as a person, the families and friends will be forced to endure a parade of reasons why the victim's death does not justify the death penalty.

Overruling Booth will not redress the failings of the criminal justice system with respect to victims and their families; indeed, the result will be quite the opposite. Throughout the pretrial investigation and the trial, the victim's families will be called upon to provide evidence to both the prosecution and the defense. In effect, they will become the warriors in the battle over the social worth of the victims. In addition, the questions about the victim's social worth and personal characteristics can be expected to last for years, as the specter of ineffective assistance of counsel must be

examined in habeas proceedings. See Burger v. Kemp, 483 U.S. ___, 97 L.Ed.2d 638, 653-58 (1987).

Finally, permitting the appropriateness of the death penalty to be determined by the social worth of the victim will have severe consequences on the victim's family. When society's use of the ultimate penalty is determined by the social worth of the victim, any sentence less than death will be viewed as an indication that society does not value the loss of the victim. Such a prospect is quite likely, if for no other reason than few murders result in a death sentence. See e.g., Gregg v. Georgia, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, and Stevens, J.J.). Thus, rather than making the criminal justice system more responsive to victims' needs, overruling Booth will

have the effect of making it less responsive and increase the likelihood that victims' families will resent their treatment.

II.

THIS COURT SHOULD REAFFIRM ITS HOLDING IN BOOTH V. MARYLAND THAT THE EIGHTH AMENDMENT PROHIBITS A STATE FROM USING THE SOCIAL WORTH AND PERSONAL CHARACTERISTICS OF THE MURDER VICTIM TO DETERMINE THE APPROPRIATENESS OF A DEATH SENTENCE.

Amici respectfully submits that the Eighth Amendment does not permit a State to impose the death penalty based on the victim's personal characteristics and status in the community. The democratic traditions upon which our criminal justice system depend long ago discarded notions that a crime victim's social standing should influence a criminal's punishment.

A. EIGHTH AMENDMENT JURISPRUDENCE AND THE BOOTH V. MARYLAND DECISION.

"[O]ne of society's most basic task is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder." Gregg v. Georgia, 428 U.S. at 226 (White, J., concurring). A State may impose the ultimate punishment for certain aggravated murders, but only if the procedures used comply with the Eighth Amendment. Godfrey v. Georgia, 446 U.S. 420, 427-28 (1980) (opinion of Stewart, J.).

In Gregg v. Georgia, this Court held that the death penalty did not violate the Eighth Amendment if the sentencer's "discretion . . . [is] suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

428 U.S. at 189 (plurality opinion of Stewart, Powell, and Stevens, J.J.). Moreover, a sentencer's decision on whether death is appropriate must be guided by "'the circumstances of the offense together with the character and propensities of the offender.'" Id. (quoting Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55 (1937)). The case law since Gregg confirms that the Eighth Amendment requires that death sentencing decisions be based on an individualized consideration of the defendant's personal culpability. See Booth, 107 S. Ct. at 2533 ("[T]he jury is required to focus on the defendant as a 'uniquely individual human bein(g).'") (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion of Stewart, Powell, and Stevens, J.J.)); California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J.,

concurring) ("Lockett and Eddings reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant.") (emphasis added).

This Court has consistently recognized that individualized decisionmaking is thwarted when the jury or judge considers factors beyond the defendant's control as reasons to impose death. State procedures must carefully confine the sentencer's discretion to constitutionally relevant factors, as "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977). As Justice O'Connor recognized in Caldwell v. Mississippi, 472 U.S. 320, 343 (1985),

death sentencing procedures violate the Constitution if they "creat[e] an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously' or through 'whim or mistake'" (quoting California v. Ramos, 463 U.S. 992, 999 (1983)).

In the 1987-1988 Term, this Court, returning to these principles, recognized the unique nature of the death penalty, and reaffirmed the familiar restrictions on unbridled sentencing discretion. In Johnson v. Mississippi, 486 U.S. ___, 108 S. Ct. 1981, 1986 (1988), this Court stated:

> The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special "need for reliability in the determination that death is the appropriate punishment" in any capital case. See Gardner v. Florida, 430 U.S. 349, 363-64 (1977) (quoting

> Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (White, J., concurring in judgment)). Although we have acknowledged that "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death,'" we have also made it clear that such decisions cannot be predicated on mere "caprice" or on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process." Zant v. Stephens, 462 U.S. 862, 884-85, 887 n.24 (1983).

"In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds." Mills v. Maryland, 486 U.S. ___, 108 S. Ct. 1860, 1866 (1988). In sum, "[u]nless we can rule out the substantial possibility that the jury may have rested its verdict on the 'improper' ground, we must remand for resentencing." Id. at 1867.

In light of these established

principles of Eighth Amendment jurisprudence, this Court's decision in Booth v. Maryland was well-reasoned and correct. Booth held that a death sentencing decision may not be predicated on "personal characteristics of the victims and the emotional impact of the crimes on the family" because such information does not instruct on the defendant's "moral guilt." 107 S. Ct. at 2533. As this Court reasoned,

> [The character and reputation of the victim and the effect on his family] may be wholly unrelated to the blameworthiness of a particular defendant. . . . [T]he defendant often will not know the victim, and therefore will have no knowledge about the existence or characteristics of the victim's family. Moreover, defendants rarely select their victims based on whether the murder will have an effect on anyone other than the person murdered. Allowing the jury to rely on a VIS therefore could result in imposing the death sentence because of factors

> about which the defendant was unaware, and that were irrelevant to the decision to kill. This evidence thus could divert the jury's attention away from the defendant's background and record, and the circumstances of the crime.

Id. at 2534.[2]

This Court explicitly rejected the State's argument that the "emotional trauma suffered by the family and the personal characteristics of the victims" constituted a circumstance of the crime. Id. at 2533. The Court concluded that "this information is irrelevant to a capital sentencing decision, and that its

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[2] Booth recognized, however, that in certain cases, the victim's status might be relevant if the defendant was aware of the personal characteristics or the effect that killing would have on the family and friends, and acted on that awareness. 107 S. Ct. at 2534 ("As we have recognized, a defendant's degree of knowledge of the probable consequences of his actions may increase his moral culpability in a constitutionally significant manner.").

admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." Id.

Booth also based its decision on a second rationale, one that Amici respectfully submits provides an additional compelling reason to reaffirm the holding of that case. This Court held that a death sentencing determination cannot constitutionally "turn on the perception that the victim was a sterling member of the community rather than someone of questionable character. This type of information does not provide a 'principled way to distinguish [cases] in which the death penalty was imposed from the many cases in which it was not.'" Id. at 2534 (quoting Godfrey, 446 U.S. at 433 (opinion of Stewart, J.). The Court

continued:

> We are troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Of course, our system of justice does not tolerate such distinctions. Cf. Furman v. Georgia, 408 U.S. 238, 242 (1972) (Douglas, J., concurring).

Id. at 2534 n.8. Thus, in reaching its decision, the Court simply applied the principle that the state must accord all murder victims equal human dignity and value in a death sentencing determination.

Similarly, the South Carolina Supreme Court below concluded that evidence of the victim's good character is irrelevant to the sentencing decision. State v. Gathers, 295 S.C. 476, 369 S.E.2d 140, 144, cert. granted, 109 S. Ct. 218 (1988). Significantly, the court

relied on its prior decision in State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985), which held that "evidence of [the] victim's bad character [was] not admissible as mitigating evidence in [the] sentencing phase," Gathers, 368 S.E.2d at 144.

Amici respectfully submit that the two rationales used by the Booth Court and in turn by the South Carolina Supreme Court are compelling. Because the Eighth Amendment derives much of its meaning from the evolution of punishment and principles within our democratic framework and how they relate to the "evolving standards of decency," Amici addresses the second rationale first.

B. THE BOOTH COURT'S INTERPRETATION OF EVOLVING STANDARDS OF DECENCY IS FIRMLY SUPPORTED BY THE HISTORICAL EVOLUTION OF OUR CRIMINAL JUSTICE SYSTEM AND EGALITARIAN PRINCIPLES CONTAINED IN OUR DEMOCRATIC FRAMEWORK THAT kEQUIRE A STATE TO ENSURE THE PROTECTION OF ITS CITIZENS WITHOUT REGARD TO SOCIAL STATUS.

The Booth Court's conclusion that a death sentence should not turn on the social worth of the victim stems from our deep-rooted commitment to social equality. As this Court has consistently recognized, the Eighth Amendment's prohibition on cruel and unusual punishments derives its meaning from "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958); see also McCleskey v. Kemp, 481 U.S. ___, 107 S. Ct. 1756, 1770-71 (1987). The progress of our maturing society, especially "as public opinion [has] become[] enlightened by a human

justice," Weems v. United States, 217 U.S. 349, 378 (1910), has been consistent in the belief that our democratic society is not permitted to dole out police protection and criminal punishment based on the citizen's status in the community.

An inquiry into the "evolving standards of decency" must begin with an examination of the principles upon which our maturing society has been based. The fundamental principle of equality contained in the social contract of governments is that individuals relinquish self-help and vigilante justice to the government in return for society's collective protection.[3] An

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[3] John Locke wrote of individuals' relinquishment of the right to punish when a government is formed:

> [B]ecause no political society can be nor subsist without having in itself the power to preserve the property, and, in

> order thereunto, punish the offences of all those of that society, there, and there only, is political society, where every one of the members hath quitted this natural power, resigned it up into the hands of the community in all cases that exclude him not from appealing for protection to the law established by it; and thus all private judgment of every particular member being excluded, the community comes to be umpire; and by understanding indifferent rules and men authorized by the community for their execution, decides all the differences that may happen between any members of that society concerning any matter of right, and punishes those offences which any member hath committed against the society with such penalties as the law has established; whereby it is easy to discern who are and who are not in political society together.

J. Locke, Second Treatise on Civil Government ¶ 87 (1690); cf. Carter, When Victims Happen to be Black, 97 Yale L.J. 420, 422 (1988) ("If the government cannot or will not protect the people, then the social compact is rent asunder, and people have to protect themselves

integral part of the social contract, as it has evolved in our political philosophy, is the notion that each citizen is entitled to the same protection accorded fellow citizens.

The Anglo-American system of criminal justice long ago accepted the responsibility of collective protection and replaced the system in which the social status of the victim determined the amount of "justice" obtained. Prior to the development of modern criminal law and procedure in the nineteenth century, criminal punishment in England depended upon private prosecutions by victims or their survivors, at first in the field of battle and later in local courts. See T. Plucknett, A Concise History of the Common Law 424-26 (5th ed. 1956).

against the stream of evil pouring through.").

Victims and their families often collected compensation from the offender as the punishment for the crime; even homicide "was a deed that [could] be paid for by money." 2 F. Pollock & F. Maitland, The History of English Law 451 (Cambridge Univ. Press 2d ed. 1968); see also id. at 450 ("The injured kin would avenge its wrong not merely on the person of the slayer, but on his belongings."). Moreover, the punishments meted out differed depending upon the social status of the aggrieved person. See, e.g., id. (The injured kin "would have life or lives for life, for all lives were not equal value; six ceorls must perish to balance the death of one thegn."); 1 F. Pollock & F. Maitland, supra, at 48 (Under Anglo-Saxon criminal law, compensation for homicide, wer, was "the value set on a man's life, increasing

with his rank").[4]

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[4] Even as punishment became a creature of statute, discrimination based on the status of the victim continued. For example, a seventh century statute provided for differing punishment for the crime of rape, depending upon the social worth of the victim:

> A man who "lays with a maiden belonging to the king," for example, had to pay fifty shillings compensation, but if she was "a grinding slave" the compensation was halved. Compensation for lying with a nobleman's serving maid was assessed still lower at twelve shillings and with a commoner's serving maid at six shillings. If a freeman raped the slave of a commoner he had to pay more than five shillings' compensation, but if a slave raped the same girl he was castrated.

C. Hibbert, The Roots of Evil: A Social History of Crime and Punishment 4 (1963).

Status of the victim also had a role in the application of capital punishment. In the fourteenth century, English law provided the death penalty for petty treason, which was the killing of a husband by a wife, but not for a husband killing the wife. T. Plucknett, A Concise History of the Common Law 443

The private system of justice was gradually replaced with common law proceedings, which vested the criminal justice function in the central governmental authority.[5] As criminal punishment was transformed to serve the

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(5th ed. 1956).

[5] Many political philosophers during this time, including Cesare Beccaria, Jeremy Bentham, and John Stuart Mill, convincingly argued that the purpose of punishment must be guided by the society's interests in preventing future crime, rather than redressing the damage inflicted on the individual victims. See J. Hagan, Victims Before the Law: The Organizational Domination of Criminal Law 11 (1983) (An "implication of the utilitarian philosophy of punishment offered by Beccaria and Bentham . . . [is] that victims should play no direct role at all in criminal justice decisions about prosecution and punishment."); see also Gale, Retribution, Punishment, and Death, 18 U.C. Davis L. Rev. 973, 974 n.4 (1985) ("In a representative democracy, which postulates the political equality of its members, an important social institution that enables some members to exert significant power over others is required to have a public rationale.").

collective interests of society, civil tort law served as the vehicle for compensation for crime victims. T. Plucknett, supra, at 422-23, 458. This transferring of authority for criminal punishment from private to public was accompanied by an increasing respect for equality of all persons in the community. See W. Bowers, Legal Homicide: Death as Punishment in America, 1864-1982, at 139 (1984) ("In effect, the economic revolution of the eighteenth century brought about a new balance in English society . . . . The sacredness of property rights, as proclaimed by Locke, was displaced by a new-found reverence for human rights and liberties associated with the Enlightenment -- providing a mandate for the full political incorporation of all citizens, not just the propertied

classes.").[6]

Although the acceptance of enlightenment produced a criminal justice system in which all "persons" were entitled to equal protection by the state, the concept that all human beings were persons was not universally accepted. The most notorious and

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[6] With regard to assigning punishment based on the status of the victim, Cesare Beccaria wrote:

> Others measure crimes rather by the dignity of the injured person than by the importance (of the offense) with respect to the public good. If this were the true measure of crimes, an irreverence toward the Being of beings ought to be more severely punished than the assassination of a monarch, the superiority of nature constituting infinite compensation for the difference in the injury.

Beccaria, On Crimes and Punishments (1764), reprinted in Theories of Punishment 117, 134 (S. Grupp ed. 1971).

prevalent discrimination in criminal punishments in the United States was that based on race. Indeed, until the passage of the Reconstruction Amendments to the U.S. Constitution, state statutes expressly provided for differing punishments depending upon the race of the victim.[7]

Although the enactment of the Reconstruction Amendments provided the means for nullifying statutes that differentiated punishments based on

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[7] Prior to the Reconstruction Amendments, southern States routinely imposed differing punishments depending upon the race of the offender and the race of the victim. See, e.g., A. Higginbotham, In the Matter of Color: Race in the American Legal Process 256 (1978) (differential punishment schemes based on race of victim and race of defendant); see also Ga. Penal Code, Pt. 4., Tit. 1, Div. 4 §§ 4704 (rape of white woman by a black punishable by death), 4249 (rape of a black woman punishable by a fine and imprisonment) (1861), quoted in McCleskey v. Kemp, 107 S. Ct. at 1786 (Brennan, J., dissenting).

victim's race, they proved less effective in removing discrimination from the actual administration of criminal laws in the South. Those who administered criminal justice continued to discriminate based on race and alienage of the victim.[8] The failure to ensure

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[8] That the Civil War did not eliminate discrimination in the administration of police protection is evident by the countless abuses suffered by black persons while southern authorities refused to act. In Monroe v. Pape, 365 U.S. 167 (1961), Justice Douglas quoted the members of Congress who in 1871 spoke of the need for equal protection of the laws for all citizens:

> [Mr. Lowe of Kansas said] "While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice.

that all individuals were entitled to protection of the criminal justice system condemned an entire race to unequal treatment. See D. Bell, Race, Racism and American Law 207 (2d ed. 1980).

The evolution of our criminal

> Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress."

Id. at 175; see also Wilson v. Garcia, 471 U.S. 261, 276-77 (1985); Briscoe v. Lahue, 460 U.S. 325, 336-40 (1983); District of Columbia v. Carter, 409 U.S. 418, 425-29 (1973). Moreover, even when individuals were brought to trial for criminal acts against blacks, they were often acquitted. See C. Woodson & C. Welsey, The Negro in Our History 394 (1922) (citing several cases in which individuals killing blacks were not punished).

To address the refusal or failure of southern authorities to provide legal protection to black persons, Congress enacted a whole host of legislation, which required the federal judiciary -- through civil and criminal proceedings-- to enforce the civil rights of all persons. See D. Bell, Race, Racism and American Law 30-38, 207-30 (2d ed. 1980).

justice framework has thus produced an understanding that police protection and criminal punishment cannot depend on the victim's social worth to the community.[9] Moreover, respect for these principles requires constant vigilance in the application of law: "The moral requirement of equal treatment makes systemic concerns about the operation of the criminal justice system ... morally central." Radin, Proportionality, Subjectivity, and Tragedy, 18 U.C. Davis L. Rev. 1165, 1170 (1985).

Mindful of the evolution of the

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[9] This is not to say that a legislature cannot define criminal liability based on circumstances of the crime and the offender's awareness of those circumstances. For example, a State may constitutional punish the intentionally killing of a police officer in the line of duty where the defendant was aware of the officer's occupation. See, e.g., State v. Glenn, 504 N.E.2d 701 (Ohio 1986).

criminal justice system and our struggle to guarantee the protection of the laws to all persons, the Booth Court was properly troubled when the State of Maryland suggested that a death verdict may turn on whether the victim was a sterling member of society. 107 S. Ct. at 2534. The unyielding march of our civilized society is to rid our country of such discriminatory treatment, and Booth properly concluded that evolving standards of decency, as they define the Eighth Amendment, prohibit such discrimination in selecting those defendants deserving of society's ultimate punishment.

C. PERMITTING THE STATE TO INTRODUCE AND ARGUE A VICTIM'S SOCIAL STATUS AND PERSONAL CHARACTERISTICS FAILS TO PROVIDE MEANINGFUL REASONS FOR IMPOSING THE DEATH SENTENCE AND ALLOWS THE DEATH PENALTY TO BE IMPOSED BECAUSE OF CONSTITUTIONALLY IMPERMISSIBLE AND IRRELEVANT FACTORS.

Even if the Eighth Amendment did not prohibit entirely the use of a victim's social standing, other aspects of the Eighth Amendment's requirements of individualized sentencing and other constitutional provisions require careful scrutiny of a State's use of a victim's personal characteristics as reasons for imposing death. In particular, the factors used in this case -- the religious practices of Mr. Haynes and that he was a registered voter -- fail to comply with strict adherence to constitutional principles.

Although a State is free to adopt its own death penalty sentencing procedures, those procedures "must

channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (citations and footnotes omitted). Moreover, the sentencer is discretion to impose the death sentence must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg, 428 U.S. at 189 (opinion of Stewart, Powell, and Stevens, J.J.). The "capital sentencing scheme must, in short, provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases ir which it is not.'" Godfrey v. Georgia, 446 U.S. at 427-28 (opinion of Stewart, J.) (quoting Gregg v. Georgia, 428 U.S. 153,

188 (1976) (opinion of Stewart, Powell, and Stevens, J.J.) and Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring)).

State procedures that permit a sentencer to consider personal characteristics and social standing of the victim fail to comply with Eighth Amendment jurisprudence in two major respects. First, they permit the imposition of the death penalty for reasons that do not meaningfully distinguish between those that deserve to die and those that do not. Second, they permit the imposition of a death sentence for constitutionally impermissible or irrelevant factors.

The procedures below illustrate both defects in a death sentencing scheme that permits the introduction of a victim's personal characteristics. The State of

South Carolina did not determine what aspects of a victim's personal characteristics constitute reasons to impose a death sentence. Rather, the individual prosecutor and the jury were left with unlimited discretion to determine what aspects were relevant and what weight to assign those characteristics.

The prosecutor's argument in this case fully supports the position that using victim characteristics will fail to guide adequately the sentencer's discretion. The prosecutor argued that because Mr. Haynes had registered to vote, the death penalty was the appropriate punishment. State v. Gathers, 369 S.E.2d at 144. The particular defect with the State's position is that this factor does not relate to the defendant's culpability

because registering or not registering to vote does not reveal whether Mr. Haynes was a worthy individual. The State obviously cannot support the view that a person who is not a registered voter is unworthy of societal protection to the fullest extent of the law.[10] Thus, the use of a personal characteristic that reveals no constitutionally significant reason why the death penalty should be imposed fails to distinguish in a meaningful manner.[11]

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[10] Indeed, society has an obligation to protect its members without regard to whether they are eligible to vote. Many members of our society are legally unable to register, e.g., those under eighteen and aliens. Society, of course, must protect these individuals in the same manner as it does those who do register to vote.

[11] The logic of Amici's argument is clearly seen when one examines what a defendant in Mr. Gather's position could do to counter the State's efforts. For example, could a defendant rebut the prosecutor's use of the voter

The defect identified by the prosecutor's use of Mr. Haynes' voter registration card is not unique to that particular aspect of the victim's background. Almost all personal characteristics are capable of supporting the position that the murder of a person was particularly tragic. The critical Eighth Amendment concern is whether the particular aspect of a victim's character used as a reason to death sentence implies the converse -- that is, the absence of such a character trait should be a mitigating factor. To hold otherwise would mean that a death sentence is imposed because of factors universal to all murder cases. See Godfrey, 446 U.S. at 433 ("There is no

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registration cards by showing that the victim, although registered, did not vote?

principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not."); see also McCleskey, 95 L.Ed.2d at 286 (Constitution requires that states have "carefully defined standards that must narrow a sentencer's discretion to impose the death sentence").

Using a victim's personal characteristics also risks a death sentence imposed because of constitutionally impermissible and irrelevant grounds. In upholding the presentation to the jury of a defendant's previous criminal activity as a nonstatutory aggravating circumstance, this Court in Zant v. Stephens, 462 U.S. 862 (1983), expressly stated that consideration of certain factors as aggravating circumstances may violate the Constitution:

> Nor has Georgia attached the "aggravating" label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant, cf. Herndon v. Lowry, 301 U.S. 242 (1937), or to conduct that actually shouid militate in favor of a lesser penalty, such as perhaps the defendant's mental illness. Cf. Miller v. Florida, 373 So. 2d 882, 885-886 (Fla. 1979). If the aggravating circumstance at issue in this case had been invalid for reasons such as these, due process of law would require that the jury's decision to impose death be set aside.

462 U.S. at 885 (emphasis added).

What constitutes an impermissible or irrelevant ground derives from all constitutional principles, including the Eighth Amendment, the Due Process Clause, Equal Protection, the First Amendment. For example, principles embodied in the Equal Protection Clause would prohibit certain aspects of a murder victim's life

to be used in determining punishment. Absent a showing of sufficient governmental interest, the State could not use the following factors as reasons to impose a death sentence: race,[12] ancestry,[13] gender,[14] legitimacy,[15]

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[12] See, e.g., Strauder v. West Virginia, 100 U.S. 303, 307 ("[A]ll persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, ... no discrimination shall be made against them by the law because of their color...."); cf. Linda R.S. v. Richard D., 410 U.S. 614, 621 (1973) (White, J., dissenting) ("If a State were to pass a law that made only the murder of a white person a crime, I would think that Negroes as a class would have sufficient interest to seek a declaration that the law invidiously discriminated against them.").

[13] See, e.g., Loving v. Virginia, 388 U.S. 1, 11 (1967) ("Over the years, this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'") (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

alienage,[16] economic success or standing,[17] and property ownership.[18]

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[14] See, e.g., Orr v. Orr, 440 U.S. 268, 279-80 (1979) (invalidating a state law imposing alimony obligations only on men). But see Michael M. v. Superior Court, 450 U.S. 464 (1981) (statutory rape law protecting teenage girls did not violate equal protection because state justification for discriminatory treatment -- deterring teenage pregnancies -- sufficient).

[15] See, e.g., Trimble v. Gordon, 430 U.S. 762, 773 (1977) (discrimination against illegitimates impermissible because "illegitimate children can affect neither their parents' conduct nor their own status").

[16] See, e.g., Takahashi v. Fish and Game Commission, 334 U.S. 410, 420 (1948) (aliens have the same right to the full and equal benefit of all laws and proceedings).

[17] This Court has unequivocally stated that economic status or achievement is not a constitutionally relevant factor: "We should say now, and in no uncertain terms that a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States. . . . The mere state of being without funds is a neutral fact--constitutionally an irrelevance, like race, creed, or color." Edwards v.

In a death sentencing context, permitting a prosecutor to argue that a victim's personal characteristics are to be considered by the jury as a "circumstance of the crime" and should be weighed in the sentencing calculus creates a impermissible risk that the sentence will be imposed for constitutionally irrelevant factors. In the instant case, the jury was instructed that it was to consider "the circumstances of the crime" in its decision.

The South Carolina prosecutor's use of Mr. Haynes's particular religious characteristics in urging the jury to return a death sentence is especially

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California, 314 U.S. 160, 184-85 (1941).

[18] Turner v. Fouche, 396 U.S. 346 (1970) (limiting school board membership to those who own property wholly irrational).

troubling. State v. Gathers, 369 S.E.2d at 144 ("These remarks conveyed the suggestion appellant deserved a death sentence because the victim was a religious man and a registered voter.").

Although the religious practices of a victim determined the amount of punishment during the Feudal Age, the factor is constitutionally irrelevant under our system of criminal justice.[19]

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[19] The victim's religion might be relevant to the death sentencing decision if it was truly relevant as a "circumstance of the crime," -- e.g., because the defendant killed the victim on the basis of his religion. As the Booth Court recognized, victim characteristics may constitutionally enter the weighing process if those characteristics were known to the defendant and influenced his or her conduct during the crime. Booth, 107 S. Ct. at 2534. This is not the case here. Contrary to Petitioner's post-hoc rationalizations, there was no evidence at trial that Respondent was aware of Mr. Haynes' religious proclivities, read the card that Mr. Haynes carried and which the prosecutor read to the jury, or acted on that knowledge.

Indeed, the First Amendment to the U.S. Constitution prohibits the government from discriminating on the basis of one's religious beliefs or non-beliefs. See Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (government may not "pass laws or impose requirements which aid all religions as against nonbelievers"); see also West Virginia State Board of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("no official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion").[20]

Petitioner and Amici in support of

[20] Booth did not have the occasion to examine whether other constitutional principles may prohibit the use of victim characteristics. At least, with respect to the prosecutor's classification based on religious beliefs, Booth's prohibition has constitutional authority apart from Eighth Amendment jurisprudence.

Petitioner contend that Booth v. Maryland removed "harm" as a consideration from the death sentencing determination. Booth did nothing of the kind. The "harm" that is always present in a murder case is that a human being was killed. Booth did not, and could not, remove that fact from the sentencer's consideration. What Booth precluded was the State from attaching differential value to that "harm" depending upon society's assessment of the victim's social worth. What Booth did is require the State to recognize that the murder of any member of our community deserves condemnation, not just the members that society deems worthy of protection.

CONCLUSION

Amici respectfully submits that this case should not be the vehicle to permit the social worth of the victim to

determine whether the death penalty is appropriate and to overrule our democratic traditions.

Respectfully submitted,

MICHAEL LAURENCE*
ACLU FOUNDATION OF
NORTHERN CALIFORNIA

PAUL L. HOFFMAN
JOAN W. HOWARTH
JOHN W. HEILMAN
ACLU FOUNDATION OF
SOUTHERN CALIFORNIA

Attorneys for Amici

*Counsel of Record

default.[3] To reach a contrary conclusion could require the Supreme Court of South Carolina to act in a manner which is inconsistent with century old precedent and places this Court in the partial position of moving to protect the interests of one party litigant when that party has itself neglected to do so. Application of this procedural rule, therefore, could nowise be construed as constituting merely an attempt to "evade review." See Konigsberg v. State Bar of Calif., 366 U.S. 36, 82 S.Ct. 21 (1961); Henry v. Mississippi, supra.

B.

As previously noted Demetrius Gathers has filed a Motion for a Speedy Trial in the court which now has jurisdiction over the matter. Consequently there is no reason why Mr. Gathers cannot be retried at this time and sentenced to life imprisonment. Therefore, any decision rendered by this Court on Petitioner's request for certiorari review would be advisory only on the scope of Eighth Amendment law in that Gathers' death sentence cannot be reinstated absent subject matter jurisdiction in the state Supreme Court. Advisory opinions by this Court are

[3]On this ground cases such as Aetna Casualty Co. v. Flowers, 330 U.S. 464, 67 S.Ct. 798 (1947) can be distinguished. Those cases permit a recall of a federal circuit court remand, and thus do not reach matters of state court jurisdiction.

not favored, North Dakota State Board of Pharmacy v. Snyder's Drugstores, Inc., 414 U.S. 156 (1973); Herb v. Pitcairn, 324 U.S. 117, 65 S.Ct. 459 (1945), and can encroach upon the plenary powers reserved by the state Supreme Court. Johnson v. Radio Station WOW, 146 Neb.429, 19 N.W.2d 853 (1945). Also see United States v. Fruehauf, 365 U.S. 146, 81 S.Ct. 547 (1961) where this Court refused to give an advanced expression of legal judgment upon issues which remained unfocused. The Eighth Amendment question in the present case is in a similar posture because we do not know at this time the true nature of either the State's theory of the case at resentencing or the evidence to be introduced at that time.

CLARIFICATION OF OPINION

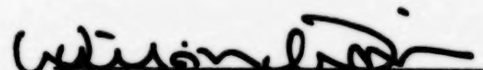
On October 25, 1988, Demetrius Gathers filed a "Motion for Clarification of Opinion" with the Supreme Court of South Carolina. To that motion on November 23, 1988, Petitioner responded that the state Supreme Court lacked jurisdiction to entertain such a request. While this Court may remand a case for clarification of opinion if it cannot readily be discerned whether the opinion rests on application of state law or federal law, Orr v. Orr, 440 U.S. 268, 277 99 S.Ct. 1102, 1110 (1979), we would submit that such a remand by this Court could only be made if the

record shows that certiorari jurisdiction had been established ab initio. As of the date of this motion, the Supreme Court of South Carolina has not ruled on the Motion for Clarification.

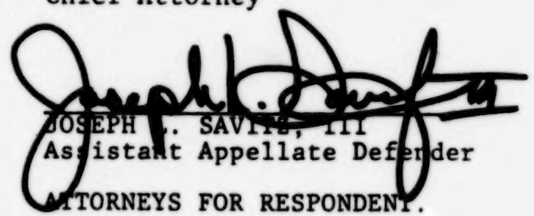
CONCLUSION

WHEREFORE, Demetrius Gathers would respectfully request of this Court that the Petition for Writ of Certiorari be dismissed as improvidently granted as a result of Petitioner's procedural default; in the alternative and subject to the foregoing prayer, we would request that this Court stay the proceeding in this Court and remand the case for clarification, Orr v. Orr, supra; in the alternative and subject to the foregoing, we would request that the Petition for Writ of Certiorari be dismissed without prejudice pending the outcome of Respondent's Motion for Clarification now pending in the state Supreme Court. Southern & Northern, etc., v. Public Utilities Comm. of Calif., supra.

Respectfully submitted,



WILLIAM ISAAC DIGGS
Chief Attorney



JOSEPH L. SAVITZ, III
Assistant Appellate Defender

ATTORNEYS FOR RESPONDENT.

This 7th Day of December, 1988.

EXHIBIT A

The Supreme Court of South Carolina

CLYDE N. DAVIS, JR.
CLERK
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

June 17, 1988

The Honorable Howard A. Taylor
Clerk of Court, Charleston County
P. O. Box 293
Charleston, SC 29401

Re: The State v. Demetrius Gathers

Dear Mr. Taylor:

Enclosed is the remittitur in the above case.

By copy of this letter, all counsel of record are advised of the action of the Court.

Sincerely yours,

Clyde N. Davis, Jr.
CLERK

CND,JR/csl

Enclosure

cc: Joseph L. Savitz, III, Esquire
Joseph F. Kent, Esquire
The Honorable Donald J. Zelenka

EXHIBIT B

STATE OF SOUTH CAROLINA,)
)
COUNTY OF CHARLESTON.)

IN THE COURT OF GENERAL SESSIONS
CASE NO. 88-GS-10-0466

STATE OF SOUTH CAROLINA,)
)
VS.)
)
DEMETRIUS GATHERS,)
)
Defendant.)

MOTION FOR SPEEDY TRIAL

Comes now, Demetrius Gathers, by his Attorney, J. Wescoat Sandlin, moving that he be granted a speedy trial.

J. Wescoat Sandlin
Attorney for Defendant
18 Broad Street, Suite 304
Charleston, S. C. 29401
(803) 723-6559

October 27, 1988

STATE OF SOUTH CAROLINA,)
)
COUNTY OF CHARLESTON.)

IN THE COURT OF GENERAL SESSIONS
CASE NO. 87-GS-10-0417

STATE OF SOUTH CAROLINA,)
)
VS.)
) ACKNOWLEDGMENT OF SERVICE
DEMETRIUS GATHERS,)
)
Defendant.)

Service of a copy of the Motion For Speedy Trial in the above entitled action hereby acknowledged at Charleston, South Carolina, this 31st day of October, 1988.

/s/ Sheila Mottarend
SOLICITOR, NINTH JUDICIAL CIRCUIT

No. 88-305

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF SOUTH CAROLINA,

PETITIONER,

V.

DEMETRIUS GATHERS,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Motion to Dismiss in the above entitled case has been served upon opposing counsel, Donald J. Zelenka, Chief Deputy Attorney General, by mailing one (1) copy in an envelope properly addressed with postage prepaid this 7th day of December, 1988.

/s/ William Isaac Diggs
WILLIAM ISAAC DIGGS
Chief Attorney

ATTORNEY FOR PETITIONER.

SWORN TO BEFORE me this 7th day of December, 1988.

/s/ Lee B. Hester (L.S.)
Notary Public for South Carolina

My Commission Expires: 1-6-96.